APPEAL NO. 93309

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 1.01 thorough 11.10 (Vernon Supp 1993). On March 18, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. After closing the record on March 26, 1993, she determined that respondent (claimant) injured his back in the course and scope of employment when he dropped to his right knee on concrete while firing his weapon as a deputy sheriff and felt a burning sensation in his lower back. Appellant (carrier) asserts that claimant did not sufficiently show that the burning sensation was related to his herniated disc, that claimant did not seek treatment for his back promptly, that there was no showing that the back problem was connected to claimant's complaints of leg pain, and that a statement should not have been admitted into evidence. Claimant states that the decision is supported by sufficient evidence and asks for affirmance.

DECISION

Finding that the decision and order are supported by sufficient evidence of record, we affirm.

Claimant testified that on (date of injury), he was a deputy sheriff for County. Part of the duties of all deputies was to qualify on the firing range twice a year. Claimant went to the range to qualify with a pistol on the afternoon of (date of injury), per the instructions of his boss, the sheriff. He described part of the firing sequence as entailing timed firing from a kneeling position; the sequence was timed beginning from a standing position from which the person dropped to one knee and fired a certain number of shots within a certain time. Claimant stated that when he dropped to his right knee, he felt a burning sensation in his right lower back. He later described it, in answer to a question from the hearing officer, as similar to being stuck by a hot iron which lasted about five to 10 seconds, and he added he then got up from that position. He never testified that he injured his leg, knee, or ankle. He stated that his right leg began to hurt that night. When he first saw a doctor, he complained of right leg pain, but never indicated that he injured his leg.

There was no issue at hearing in regard to whether claimant gave timely notice of the injury. A signed statement was introduced from the sheriff at the time (since replaced through an election) that claimant told him of the pain he felt in his back at the firing range when he returned from the range. The hearing officer admitted this statement over objection that it was not exchanged timely. The hearing officer found good cause for the time of exchange based on claimant's assertion that the statement had been received the day before. The hearing officer's decision finding good cause was not arbitrary and was not in error. *See* Texas Workers' Compensation Commission Appeal No. 91099, dated January 16, 1992. In addition any question that the statement should not have been admitted because it was not notarized is without merit. The lack of notarization would be a factor for the hearing officer to consider in deciding the weight to accord the document, but under Article 8308-6.34(e) of the 1989 Act such written statements "may" be admitted by

the hearing officer.

Claimant consistently stated that the incident on July 22nd entailed a burning sensation in his back. He added that when a doctor asked if he felt a "pop," he replied that he did not, he felt a burn. His testimony showed that when he inquired of the employer in regard to seeing a doctor for his leg pain, he did not describe the pain as work related because he did not know what its etiology was, and he did not want to take advantage of workers' compensation if the pain was not related to the job. After a period of time, claimant's doctors examined his back to determine if that could be causing the leg pain.

The hearing officer apparently determined that claimant's testimony was plausible and credible. While medical records show he initially presented with leg and knee pain, (Dr. L), an orthopedic surgeon, records that on August 18, 1992, claimant's leg symptoms "may be related to a lumbosacral radiculopathy." Dr. L also notes that (Dr. N) says that lumbosacral radiculopathy is "probable." (Dr. F) said in a letter of January 17, 1993, that he first saw claimant for the injury on July 28, 1992, and he believes that his disc problems "were work related injuries." (Dr. S) who performed the disc surgery on claimant on November 5, 1992, which was described as "decompressive lumbar laminotomies," said in a letter dated March 3, 1993 (after discussing claimant's history consistently with that previously described), "[t]he symptoms he related to me noted above are typical of this type of compression syndrome in the lumbar spine."

The Appeals Panel has stated that an injury that did not promptly follow an event could be determined to be not compensable. The question is usually one of fact for the hearing officer to decide. *See* Texas Workers' Compensation Commission Appeal No. 92617, dated January 14, 1993 and Texas Workers' Compensation Commission Appeal No. 93086, dated March 17, 1993. *Compare* Texas Workers' Compensation Commission Appeal No. 92503, dated October 23, 1992. In this case the claimant did not wait weeks or months to first mention a particular pain or symptom; his initial pain was to the back and his injury was to the back. In between, there was some confusion because claimant experienced pain in his leg, knee, and ankle. The medical evidence shows that the injury was to the back, however. Nobody is proposing surgery to the knee or ankle. In this instance the claimant experienced pain in the back when he dropped to one knee, and he promptly sought medical care; his symptoms arose within 24 hours and his foot drop was diagnosed within one month. Medical evidence was not necessary to prove causation as it is in some instances of disease. *See* Texas Workers' Compensation Commission Appeal No. 93265, dated May 20, 1993, which cited T.E.I.A. v. Thompson, 610 S.W.2d 208 (Tex. Civ. App.-Houston [1st Dist] 1980, writ ref'd n.r.e.).

The evidence is sufficient to support the hearing officer in Finding of Fact No. 6 which said that claimant while kneeling to fire his weapon felt a burning sensation in his back which was later diagnosed as herniated discs. As stated, this is a fact determination within the

judgment of the hearing officer. *See* Article 8308-6.34(e) of the 1989 Act. Finding of Fact No. 7 that indicates claimant was told by his doctor that his back problems were caused by the firing range incident is also sufficiently supported by the evidence. While Dr. F may not have told claimant that his injuries were work related on September 2, 1992, he does say that in his letter of January 17, 1993. In addition, Dr. S, in his note of September 2, 1992, refers to the relationship of symptoms and the firing range incident. Even if this finding had not been made, the claimant's testimony coupled with other medical evidence sufficiently supports the hearing officer's decision that claimant was compensably injured. The medical opinion that ties the back problem treated to the back pain experienced on July 22nd serves to buttress the decision, but the decision could stand on claimant's testimony, his actions, and the medical evidence indicating that the back problem was merely consistent with the incident claimant described.

A question is also raised as to whether the interlocutory order entered at the benefit review conference can be "affirmed," contending that it is superseded by the decision of the hearing officer. In "affirming" the interlocutory order, the hearing officer indicated her approval of its terms and negated any question that it was reversed, which would allow reimbursement from the subsequent injury fund. *See* Article 8308-6.15(e) of the 1989 Act. (We distinguish this case from Texas Workers' Compensation Commission Appeal No. 92671, decided February 3, 1993, in which the hearing officer merely affirmed the interlocutory order without deciding the ultimate issue himself.) The decision of the hearing officer that claimant was injured and is entitled to all benefits is sufficiently clear to indicate that the carrier is to pay benefits associated with the diagnosed injury--herniated discs which were treated surgically.

The decision and order are sufficiently supported by the evidence and are affirmed.

Joe Sebesta
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Thomas A. Knapp
Appeals Judge